

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 339 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HANSJIBHAI BHANABHAI PATEL

Versus

DHIRAJLAL TYAMBAKRAM PANDYA

Appearance:

MRS KETTY A MEHTA for Appellant

NOTICE SERVED BY DS for Respondent No. 1, 2, 3,
4, 5, 6, 7, 8, 9 and 10

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 02/09/98

ORAL JUDGEMENT

1. At the outset, it must be noted that both in the appeal as also in the Civil Application filed in the appeal for interim relief, the respondents were served both through the Court, and by Registered Post A.D but have chosen to remain absent. Even after the appeal was admitted and fixed for final hearing today, the respondents were served by direct service, and service has been effected as per the affidavit filed by the

appellant. However, the respondents are absent. Under the circumstances, I am dealing with the appeal after hearing only the counsel for the appellant.

2. This is an appeal under Order 43 Rule 1 CPC filed by the original plaintiff whose injunction application exh. 5 in the suit was partly allowed and partly disallowed by the trial court. This appeal is therefore restricted to the prayer which was not granted by the trial court, as regards protecting the possession of the plaintiff during the pendency of the suit.

3. The appellant-plaintiff filed a suit for specific performance of an agreement of sale. The said agreement is on the record of the suit, and although it is unregistered, there is no controversy that the same can be looked into for collateral purposes. This document discloses that the consideration for the sale to be effected by defendants in favour of the plaintiff was fixed at Rs. 10,500/- and that the entire consideration was paid by the plaintiff to the defendants at the time of execution of the document. Consequently, the document also records that possession of the suit property has been handed over to the plaintiff.

4. The plaintiff has also averred in the plaint as also in the injunction application, that pursuant to the agreement of sale, the plaintiff has been in possession of the suit property for 20 years. It may only be noted incidentally that the plaintiff also claims that the title matured in his favour on account of his having held the property against the defendants by adverse possession. However, it is pertinent to note at this stage that whether or not the plaintiff held the full title on the date of the suit is not relevant or at least critical for the purpose of considering the prayer made in the injunction application ex. 5.

5. It is also pertinent to note that the trial court as also this Court is required to deal with the plaintiff's case on the basis of the averments and pleadings made in the plaint and the injunction application. It is stated before me, and also noted in para 3 of the impugned order, that the defendants were served notice in the suit and the Notice of Motion, that they had appeared before the trial court and asked for time which was granted. Thereafter they have remained absent, and the defendants have not filed any written statement to the suit nor any reply to the injunction application exh. 5.

6. Under the circumstances, the averments and the assertions of fact contained in the plaint and the injunction application of the plaintiff must be accepted as correct, at least on a prima facie basis.

7. In the premises aforesaid, it cannot be denied that the plaintiff was placed in possession under the agreement of sale, which is obviously 20 years old. The defendants have not in any manner shown or even indicated as to whether they had at any point of time prior to the suit taken back the possession from the plaintiff. In this context, it is obvious that the trial court has confused itself in dealing with the question of title and the question of possession simultaneously, and in assuming that the plaintiff's possession can only be protected if the plaintiff succeeded in showing or making out a prima facie case in respect of title. In this context, the trial court failed to appreciate that while dealing with the injunction application, it was sufficient for the plaintiff to establish that he was in possession, and that such possession had at least some legal and rational basis.

8. It also appears that the trial court has not correctly appreciated the Commissioner's report filed before it. The Commissioner's report indicates that although the defendants were informed as regards the proposed visit of the Commissioner for the purpose of taking the inventory of the suit property, the defendants chose not to remain present. The trial court did not correctly appreciate the contents of the Commissioner's report which indicates, at least on a prima facie basis, that the plaintiff was in possession of the suit property. When the construction upon the suit property was a residential house, and the utensils found in such residential house bore the name of the plaintiff, it would clearly establish that the plaintiff was in possession of the suit property, particularly since this fact situation is supported by specific recitals in the agreement of sale.

9. The trial court also failed to correctly appreciate the fact situation that the electric meter (electric supply) on the premises stood in the name of the plaintiff's nephew, and that the bills in respect of the energy supplied through the said meter had been paid by the plaintiff's nephew. This also supports the recitals in the agreement of sale.

10. Thus I find that, once the trial court's confusion between prima facie title and prima facie

possession is cleared, the evidentiary material on record before the trial court at the stage of the injunction application clearly indicates that it was the plaintiff who was in possession of the suit property.

11. Once it is found that the plaintiff holds an agreement of sale in his favour, and is also in possession of the suit property which is the subject matter of the agreement, the plaintiff's possession must be protected by the Court. This is an established principle which does not require any discussion on law.

13. The trial court was therefore in error in not granting the injunction in favour of the plaintiff and against the defendants, restraining the latter from interfering with the possession and enjoyment of the plaintiff in respect of the suit property. To that extent therefore, the impugned order requires to be modified. It is accordingly directed that apart from the injunction already granted by the trial court, the defendants are further restrained from interfering with the plaintiff's possession and enjoyment of the suit property during the pendency of the suit.

14. This appeal is accordingly allowed with no order as to costs.

Amp/-